MSIG Insurance Malaysia Bhd v Overseas Assurance Corp

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22–NCC-36 OF 2009
ANANTHAM KASINATHER J
10 DECEMBER 2010

Insurance — Contribution — Co-insurer seeking contribution — Double insurance — Fire insurance and contractors all risk insurance — Whether both contracts of insurance in respect of same subject matter and on behalf of same assured — Whether conditions to be satisfied to succeed in claim for contribution proven — Whether co-insurer complied with loss notification clause in policy

Insurance — Fire insurance — Fire insurance with extended coverage for damage caused by subsidence and landslip — Whether claim fell within peril stipulated in policy — Subsidence and settlement — Whether different — Whether difference relevant in establishing damage

Perdana Parkcity Sdn Bhd ('the insured'), the developer of a residential township known as Desa Parkcity ('the township') in Kuala Lumpur, was insured with MSIG Insurance Malaysia Bhd ('the plaintiff') and Overseas Assurance Corp ('the defendant'). The plaintiff had issued a fire policy in respect of 165 units of two storey terrace houses ('the property') in the township in favour of the insured, which included an endorsement for coverage for damage caused to the property by, inter alia, 'subsidence and landslip' for the period of cover, from 22 April 2005 to 21 April 2006. The defendant issued a contractors all risk policy ('CAR policy') to the insured in respect of the property and also 20–22 storey apartments in the township, from the period 31 May 2002 to 30 May 2007. On 11 January 2006, after the completion of the construction of the various units of buildings in the township, the insured discovered that cracks had appeared in the property ('the damage') and notified the plaintiff of the damage. The plaintiff appointed a firm of loss adjusters to investigate and determine liability, if any, under the policy. The loss adjusters' final report, which was guided by expert reports, expressed that the damage was due, inter alia, to soil movement and recommended settlement of the insured's claim. At the same time, the plaintiff was advised to recover from the defendant by way of contribution half the sum paid to the insured. The plaintiff accordingly indemnified the insured for the sum of RM1,011.838.31 and then sought contribution from the defendant by way of its letter dated 2 March 2009. When the defendant refused to contribute, the plaintiff proceeded to file the present claim seeking contribution from the defendant in respect of the amount of RM522,838.31. The plaintiff's case was that since the damage

suffered by the insured was a risk insured under two policies, the obligation to compensate the insured fell equally upon the two insurers. Since the plaintiff had indemnified the insured, it was the plaintiff's contention that it was entitled under the doctrine of contribution in insurance law to recover half of the payment made, which amounted to RM522,838.31 from the defendant who was the other insurer. The defendant did not dispute the doctrine of contribution but contended that the plaintiff had failed to discharge the burden of proving there was double insurance, ie, that there was another subsisting contract of insurance on the same property and on the same interest. The defendant also submitted that the insured's claim did not fall within the peril stipulated in the plaintiff's policy and to that extent the claim was settled ex gratia. Alternatively the defendant argued that even if the insured's loss fell within the peril stipulated in the plaintiff's policy, liability was excluded from application since the extended coverage was limited in its application. The plaintiff's case was that policy liability attached under its policy irrespective of whether the damage was caused by subsidence or settlement. The defendant, on the other hand, took the position that there was a distinction in insurance law between subsidence and settlement and liability only attached if the damage was caused due to subsidence. The defendant further submitted that although the damage was discovered on 11 January 2006, it was only notified of the said damage on 20 February when the CAR policy required the defendant to be notified of any loss within 30 days of loss or discovery. The defendant thus urged the court to dismiss the plaintiff's claim on this ground.

Held allowing the plaintiff's claim with costs:

(1) The two policies covered the same subject matter, ie 165 units of two storey terrace houses in the township, even though the CAR policy also covered additional property in the form of 20–22 storey apartments in the township. The condition that the two policies must be effected by or on behalf of the same assured was also fulfilled since Perdana Parkcity was insured as principal in both policies. The fact that the insured was insured as the property manager under the fire policy and as the principal/developer under the CAR policy did not detract from the fact that the insured was covered under the plaintiff's and defendant's policies in the same capacity ie as principal. It was clear that at the date of damage ie 11 January 2006, both policies were in force. Further in the present case both policies were legal contracts of insurance and both policies did not contain any provision which excluded the right to contribution. It was also established that both policies were effected against the same peril, that is subsidence and landslip. In the circumstances the six conditions to be satisfied for the plaintiff to succeed in its claim for contribution had been proven (see paras 11, 13–16, 17).

(2) Although there was a difference between subsidence and settlement, in that, subsidence of the site was a fortuity whereas settlement was not and thus predictable, it was found that in the instant case both subsidence and settlement may be covered under the plaintiff's policy depending on the causes for the cracks to the property. Based on the authorities relied upon, policy liability was not based on whether the loss was the result of subsidence or settlement but rather whether the cracks to the property were caused by 'causes unconnected with loading from a building'. From the reports and oral evidence of the author of the expert report it was evident that the cracks were not the natural consequence of the loading of the buildings and the foundations to the building but were due to the state of the pre-existing soil and the poor treatment of the same. In any event, the cause could not be said to be predictable when the expert was clearly of the opinion that the dynamic compaction method that was adopted was inappropriate (see paras 24–25 & 27).

(3) There was no merit in the defendant's submission that liability was excluded since the extended coverage was limited in its application or that the damage was caused by design related issues (see para 28).

(4) The defendant's submission that it was notified late cannot stand. The loss notification clause in the policy was only relevant when the claim was pursued by the insured against the defendant. The position in this case was very different because it was a case of a co-insurer seeking contribution. As such the plaintiff's claim for contribution only arose after it had discharged its liability to its own insured whereupon it was entitled to call upon the defendant to bear its share of the loss under the plaintiff's policy. Thus since the amount paid by the plaintiff to the insured of RM1,011,838.31 was not challenged, the defendant was ordered to pay the plaintiff the sum of RM522,233.54 as its contribution (see paras 30–31).

[Bahasa Malaysia summary

Perdana Parkcity Sdn Bhd ('pihak yang diinsuranskan'), pemaju perbandaran kediaman yang dikenali sebagai Desa Parkcity ('perbandaran') di Kuala Lumpur, telah diinsuranskan dengan MSIG Insurance Malaysia Bhd ('plaintif') dan Overseas Assurance Corp ('defendan'). Plaintif mengeluarkan polisi kebakaran berhubung 165 unit rumah dua tingkat ('hartanah') bagi pihak yang diinsuranskan di perbandaran tersebut, termasuk satu pengendorsan bagi menampung kerosakan terhadap hartanah melalui 'penenggelaman dan gelinciran tanah' bagi tempoh perlindungan, daripada 22 April 2005 hingga 21 April 2006. Defendan mengeluarkan polisi risiko keseluruhan kontraktor ('polisi RKK') kepada pihak yang diinsuranskan berhubung hartanah dan juga apartmen-apartmen 20–22 tingkat di perbandaran daripada tempoh 31 Mei 2002 hingga 30 Mei 2007. Pada 11 Januari 2006, selepas binaan pelbagai unit bangunan disiapkan di dalam

perbandaran tersebut, pihak yang diinsuranskan mendapati rekahan-rekahan telah timbul dalam hartanah ('kerosakan') dan memberitahu plaintif mengenai kerosakan tersebut. Plaintif melantik sebuah firma pelaras kerugian untuk menyiasat dan menentukan liabiliti, sekiranya terdapat di bawah polisi. Laporan akhir pelaras kerugian yang berpandukan laporan-laporan pakar menyatakan bahawa kerosakan tersebut adalah disebabkan pergerakan pasir dan mencadangkan penyelesaian terhadap tuntutan pihak yang diinsuranskan. Pada masa yang sama, plaintif dinasihatkan untuk mendapatkan sumbangan sebahagian jumlah yang dibayar kepada pihak yang diinsurans daripada defendan. Oleh sebab itu, plaintif menanggung rugi pihak yang diinsuranskan bagi jumlah RM1,011,838.31 dan kemudiannya menuntut sumbangan daripada defendan melalui surat bertarikh 2 Mac 2009. Apabila defendan enggan memberi sumbangan, plaintif terus memfailkan tuntutan ini bagi menuntut sumbangan daripada defendan berhubung jumlah RM522,838.31. Kes plaintif ialah bahawa, memandangkan kerosakan yang dialami oleh pihak yang diinsurans merupakan risiko yang diinsuranskan di bawah dua polisi, kedua-dua penanggung insurans berkewajipan untuk menanggung rugi pihak yang diinsuranskan. Memandangkan plaintif telah menanggung rugi pihak yang diinsuranskan, plaintif mendakwa bahawa plaintif berhak di bawah doktrin sumbangan ('doctrine of contribution') di dalam undang-undang insurans untuk mendapatkan semula sebahagian bayaran yang dibuat berjumlah RM522,838.31, daripada defendan yang merupakan penanggung insurans yang lain. Defendan tidak mempertikaikan doktrin sumbangan ('doctrine of contribution') tetapi mendakwa bahawa plaintif gagal untuk melepaskan beban bukti bahawa terdapat dua insurans, iaitu, bahawa terdapat satu lagi kontrak insurans yang wujud ke atas hartanah dan kepentingan yang sama. Defendan juga menghujah bahawa tuntutan pihak yang diinsuranskan tidak terangkum di bawah bahaya ('peril') yang dinyatakan di dalam polisi plaintif dan sehingga itu tuntutan tersebut diselesaikan secara ex gratia. Secara alternatifnya defendan menghujah bahawa meskipun kerugian pihak yang diinsuranskan termasuk di dalam bahaya ('peril') yang dinyatakan di dalam polisi plaintif, liabiliti dikecualikan daripada permohonan memandangkan lanjutan perlindungan adalah terhad di dalam permohonannya. Kes plaintif ialah bahawa liabiliti polisi yang dilampirkan di bawah polisinya tanpa mengira sama ada kerosakan disebabkan oleh penenggelaman atau penyelesaian. Defendan, dalam masa yang sama, mengambil langkah bahawa terdapat satu perbezaan di dalam undang-undang insurans di antara penenggelaman dan penyelesaian dan liabiliti hanya dilampirkan sekiranya kerosakan yang berlaku disebabkan oleh penenggelaman. Defendan selanjutnya menghujah bahawa walaupun kerosakan didapati pada 11 Januari 2006, defendan hanya mengetahui kerosakan tersebut pada 20 Februari memandangkan polisi RKK memerlukan defendan untuk diberitahu mengenai sebarang kerugian dalam jangka masa 30 hari kerugian atau dapatan. Oleh itu defendan menggesa mahkamah untuk mengetepikan tuntutan plaintif di atas alasan ini.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Kedua-dua polisi melindungi perkara subjek yang sama iaitu 165 unit

rumah dua tingkat di perbandaran tersebut, meskipun polisi RKK juga melindungi hartanah tambahan di dalam bentuk apartmen 20–22 tingkat di kotaraya. Syarat bahawa kedua-dua polisi mesti dikuatkuasakan oleh atau bagi pihak yang memberi jaminan yang sama perlu dipenuhi memandangkan Perdana Parkcity telah diinsuranskan sebagai prinsipal di dalam kedua-dua polisi. Fakta bahawa pihak yang diinsuranskan telah diinsuranskan sebagai pengurus hartanah di bawah polisi kebakaran dan sebagai prinsipal/pemaju di bawah polisi RKK tidak mengalihkan fakta bahawa pihak yang diinsuranskan telah dilindungi di bawah polisi plaintif dan defendan di dalam kapasiti yang sama iaitu sebagai prinsipal. Adalah jelas bahawa pada tarikh kerosakan iaitu 11 Januari 2006, kedua-dua polisi sedang berkuatkuasa. Seterusnya di dalam kes ini kedua-dua polisi merupakan kontrak undang-undang insurans dan kedua-dua polisi tidak mengandungi sebarang peruntukan yang mengecualikan hak untuk sumbangan. Adalah diputuskan bahawa kedua-dua polisi berkuatkuasa terhadap bahaya yang sama, iaitu penenggelaman dan gelinciran tanah. Di dalam keadaan ini keenam-enam syarat yang perlu dipenuhi oleh plaintif untuk berjaya dalam tuntutan sumbangannya telah dibuktikan (lihat perenggan 11, 13–16, 17).

(2) Walaupun terdapat perbezaan di antara penenggelaman dan pemendapan, iaitu penenggelaman tapak merupakan satu perkara yang berlaku secara kebetulan manakala pemendapan adalah sebaliknya and oleh itu mudah dijangka, didapati bahawa di dalam kes ini penenggelaman dan pemendapan mungkin dilindungi di bawah polisi plaintif bergantung kepada sebab-sebab rekahan ke atas hartanah. Berdasarkan autoriti-autoriti yang boleh dipercayai, liabiliti polisi bukanlah berdasarkan sama ada kerugian merupakan hasil daripada penenggelaman atau pemendapan tetapi sama ada rekahan-rekahan ke atas hartanah disebabkan oleh sebab-sebab yang tidak berkaitan dengan beban daripada sesebuah bangunan ('causes unconnected with loading from a building'). Daripada laporan-laporan dan keterangan lisan penulis laporan pakar, jelas bahawa rekahan-rekahan tersebut bukan merupakan kesan semulajadi beban bangunan-bangunan dan asas-asas kepada bangunan tetapi disebabkan keadaan pasir yang sedia ada dan kekurangan penyelenggaraan terhadap bangunan tersebut. Dalam mana-mana keadaan, penyebabnya tidak boleh dijangka apabila pakar secara jelasnya berpendapat bahawa kaedah kepadatan dinamik ('dynamic compaction method') yang digunakan adalah tidak sesuai (lihat perenggan 24–25 & 27).

(3) Tidak terdapat merit di dalam hujahan defendan bahawa liabiliti telah dikecualikan memandangkan perlindungan yang dilanjutkan adalah terhad dalam permohonannya atau bahawa kerosakan disebabkan oleh isu berhubung rekaan (lihat perenggan 28).

(4) Hujahan defendan bahawa ia lewat diberitahu tidak boleh diterima. Klausa notifikasi kerugian di dalam polisi hanya relevan apabila tuntutan diteruskan oleh pihak penginsurans terhadap defendan. Kedudukan di dalam kes ini adalah sangat berbeza kerana ia merupakan kes pihak penanggung insurans bersama menuntut sumbangan. Oleh itu tuntutan plaintif untuk sumbangan hanya timbul selepas plaintif telah melepaskan liabilitinya ke atas pihak yang diinsuranskan olehnya di mana plaintif berhak untuk memanggil defendan bagi menanggung bahagian kerugiannya di bawah polisi plaintif. Oleh itu memandangkan jumlah yang dibayar plaintif kepada pihak yang diinsuranskan sebanyak RM1,011,838.31 tidak dipertikaikan, defendan diarahkan untuk membayar plaintif sejumlah RM522,233.54, sebagai sumbangannya (lihat perenggan 30–31).]

Notes

For cases on fire insurance generally, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 96–134).

For cases on insurance generally, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1–385.

Cases referred to

David Allen & Sons Billposting Ltd v Drysdale [1939] 4 All ER 113, KBD (refd)

Legal & General Assurance Society Ltd v Drake Insurance Co Ltd [1991] 2 Lloyd's Rep 36, KBD (folld)

Ong Koh Hou v Perbadanan Bandar & Anor [2009] 8 MLJ 616, HC (distd)

Kavitha Narayanan (Anad & Noraini) for the plaintiff.

Tunku Farik Ismail (Tan Sixin with him) (Azim, Tunku Farik & Wong) for the defendant.

Anantham Kasinather J:

BACKGROUND FACTS

[1] The plaintiff issued a fire policy to Perdana Parkcity Sdn Bhd ('the insured') in respect of 165 units of two storey terrace houses at Phase 1B Parkhomes ('the property') in a commercial/residential development known as Perdana Parkcity in the Mukim of Batu, Kuala Lumpur in favour of the insured. This policy included an endorsement bearing No 00002 for the period of cover from 22 April 2005 to 21 April 2006 for damage caused to the property by, inter alia, 'subsidence and landslip'. Coverage for loss due to subsidence was already included under the main policy but available only upon payment of an additional premium. Hence, the issuance of the Endorsement upon payment of the additional premium.

[2] The defendant issued a contractors all risk policy to the insured ('CAR policy') in respect of the property, as well as, 20–22 storey apartments for the period 12 May 2003 to 26 March 2005. This policy included coverage for the period of maintenance from 29 March 2005 to 28 September 2006. The defendant's master policy is valid from 31 May 2002 to 30 May 2007 (exh 54, bundle 'B').

HISTORY OF CLAIM

[3] The insured was involved in the development of a residential/commercial township generally known as Desa Park City in Mukim Batu, Kuala Lumpur. After the completion of the construction of the various units of buildings in the township, cracks appeared in the two storey terrace houses at Phase 1B known as Nadia Parkhomes ('the said damage') and was discovered on 11 January 2006.

[4] The plaintiff after having been notified of the said damage by the insured proceeded to appoint Mesrrs Maphilindo International Sdn Bhd ('the loss adjusters') to investigate, assess the loss and determine liability, if, any, under the policy. The loss adjusters proceeded to investigate and produced several reports during the investigation on the cause of the damage/loss. The final report dated 25 September 2007 (exhs 110–129, bundle B) contains their conclusions on the causes for the damage to the buildings. In the course of the investigation, the loss adjusters with the consent of the plaintiff appointed Jurutera Perunding Kemajuan Sdn Bhd ('JPK') to investigate into the causes. The need to appoint JPK was probably the result of the findings of the project consultants being inconclusive. The project consultants for geotechnical works, Mesrrs PCGeo Management Sdn Bhd expressed the view that the cause of the cracks was due to soil movement arising from lateral and vertical migration of fine soil particles through the fills by action of ground water and the resultant differential settlement between footings.

[5] The loss adjusters' final report based on the conclusions in JPK's report (exhs 71–102B) recommended settlement of the insured claim. Accordingly, the plaintiff proceeded to indemnify its isured for the sum of RM1,011,838.31 (exhs 167–168, bundle B). This report also determined that there was policy liability under the CAR policy based on the cover for insured works taken over or put into service clause (exh 59, bundle B). Accordingly, the report included a recommendation for the plaintiff to recover from the defendant by way of contribution. The plaintiff led evidence through its broker one Miss Julie Ooi Seok Cheng ('PW5') that the defendant was first notified of this loss on 20 February 2006. The plaintiff's solicitor duly sought such contribution through its solicitor's letter of 2 March 2009 (exh 166, bundle B). The defendant having refused to contribute the plaintiff proceeded to file this claim to seek

contribution from the defendant in respect of the amount of RM522,838.31.

THE PLAINTIFF'S CASE

[6] The plaintiff's case is that since the loss suffered by the insured was a peril insured under two policies, the obligation to compensate the insured for the loss falls equally upon the two insurers ie the plaintiff and the defendant. According to the plaintiff, upon the plaintiff indemnifying the insured for its total loss, the plaintiff is entitled under the doctrine of contribution in insurance law to recover half of the payment made to the insured, from the defendant. The doctrine of the contribution in our law is best expounded in the passage at p 719 of the book *Law of Insurance* by Poh Chu Chai, (3rd Ed), which states as follows:

> When a particular risk is insured with two or more insurers and a loss arising from the risk insured is fully paid for by one of the insurers, the insurer who has indemnified the insured for the loss is entitled to claim a contribution from the other insurers who have not indemnified the insured. An insurer's right of contribution does not arise from contract but in equity, namely that persons who are liable for the same loss should contribute equally towards the loss.

[7] However, the plaintiff concedes that the right to contribution is subject to the plaintiff fulfilling six conditions. These conditions are:

(a) all policies concerned must comprise the same subject matter;

(b) all policies must be effected by or on behalf of the same assured;

(c) all policies must be in force at the time of loss;

(d) all policies must be legal contracts of insurance;

(e) no policy must contain any stipulation by which it is excluded from contribution; and

(f) all policies must be effected against the same peril.

[8] The plaintiff contended that all six conditions have been fulfilled thereby entitling it to succeeded in this claim.

THE DEFENDANT'S CASE

[9] The defendant does not dispute the doctrine of contribution. The thrust of the defence is three-fold. First, that the burden of proof vests on the plaintiff. The burden of proving another subsisting contract of insurance on the same property and on the same interest lies upon the insurer who asserts that there is double insurance (see *MacGilllivray on Insurance Law* at p 673 (3rd Ed).

Counsel for the defendant contended that the plaintiff has failed to discharge this burden. Secondly, that the insured's claim did not fall within the peril stipulated in the plaintiff's policy and to that extent, the claim was settled ex gratia. Thirdly, even if the claim is within the peril stipulated in the plaintiff's policy, it is excluded by either cl 2 of the endorsement (exh 52, bundle B) or cl (c) of the clause appearing under the caption 'subsidence and landslip' in the plaintiff's policy.

THE SIX CONDITIONS

[10] I propose, in this judgment, to examine whether the plaintiff has fulfilled the six conditions against the background facts and the law applicable to each of the conditions, to ascertain the merits behind the plaintiff's claim to have fulfilled all of the six conditions.

All policies concerned must comprise the same subject matter

[11] Counsel for the plaintiff submitted that both the plaintiff's and defendant's policies cover the same subject matter being 165 units of Parkhomes (see exh 52 of bundle B for the subject matter of the plaintiff's policy and exh 54 of bundle B for the subject matter of the defendant's policy). Counsel for the defendant does not dispute that the defendant's policy provides coverage for the property. However, he submitted that over and above the property, the defendant's policy also covered other property in the form of 20–22 storey apartments. I understand the submission of counsel for the defendant to imply that this condition is only fulfilled when the subject matter of the two policies are identical. With respect, I disagree. In my judgment, so long as the item forming the subject matter of the claim is insured under two sets of insurance policies, then, the subject matter is deemed to be the same even if one of two policies provides coverage for additional properties. Accordingly, I hold the plaintiff to have satisfied the first condition.

All policies must be effected by or on behalf of the same assured

[12] The plaintiff's policy was issued in favour of the insured (exh 42, bundle B). The defendant's policy was also issued in favour of the insured (exh 54, bundle B). The submission of counsel for the defendant that the insured were different is based in the capacity of the insured. Counsel submitted that the interest covered under the plaintiff's fire policy are 'Perdana Parkcity Sdn Bhd and/or its nominee as Property Managers and/or Individual Owners and/or Financiers and/or mortgagees f.t.r.r & i'. The interest covered under the defendant's CAR policy are 'Perdana Parkcity Sdn Bhd as Principal/Developer and /or the Lenders, their Main Contractors, their nominated sub-contractors of any tiers f.t.r.r & i'. The submission of counsel for the defendant was that

there are numerous other parties insured under the plaintiff's fire policy and the defendant's CAR policy. The only common insured is Perdana Parkcity Sdn Bhd, but under the plaintiff's fire policy, it is insured as the property manager and under the defendant's CAR policy, it is insured as the principal/developer. Against these background facts, counsel submitted that the interest of the common insured ie Perdana Parkcity Sdn Bhd was different under each policy as the capacity in which it was insured differ. For example, counsel contended that under the plaintiff's fire policy, as property manager, it would be in charge of managing the completed properties.

[13] With respect, I find no merit in this submission. As in the case of the subject matter, in my judgment, this condition is fulfilled so long as the identity and capacity in which the insured is similar for the purposes of the claim. In my opinion, it is apparent from a reading of the two policies that Perdana Parkcity is insured as principal in both policies. The fact that the insured is covered when performing the same or different jobs in respect of the same subject matter in different capacities does not detract from the fact, that, in respect of the claim, the insured is covered under the plaintiff's and defendant's policies in the same capacity ie as principal. With respect, I do not find the decision of the court in *Ong Koh Hou v Perbadanan Bandar & Anor* [2009] 8 MLJ 616 to be of any of assistance as it deals with an entirely different issue.

All policies must be in force at the time of loss

[14] Counsel for the plaintiff submitted that since the plaintiff's policy was valid from 22 April 2005 to 21 April 2006 (exh 52, bundle B) and the defendant's master policy valid from 31 May 2002 to 30 May 2007 (exh 54, bundle B), both policies were in force at the time of the loss. Counsel for the plaintiff also relied on the evidence of DW1 to the following effect;

> Q: Do you agree with me that if the loss occurred on 11.1.2006, then it falls within the ambit of both Policies?
>
> A: If you are not talking about Declaration 4, then it falls under Master Policy... covering 31.5.2002 to 30.5.2007.
>
> Q: Do you agree that it is covered by Plaintiffs Policy?
>
> A: Yes, it is covered by Plaintiffs Policy.

in support of her submission. In my judgment, since the claim under the defendant's policy is being pursued under the endorsement M116 of the main policy and the cover period extends from 31 May 2002 to 30 May 2007, it is clear that at the date of damage ie 11 January 2006, both policies were in force.

All policies must be legal contracts of insurance

[15] The plaintiff submits that there is absolutely no doubt and it is an

undisputed fact that both policies are legal contracts of insurance. Hence this requirement is fulfilled.

No policy must contain any stipulation by which it is excluded from contribution

[16] My examination of the two policies did not reveal any provision in either the plaintiff's fire policy or the defendant's CAR policies excluding the right to contribution.

All policies must be effected against the same peril

[17] The plaintiff's policy is essentially a fire policy with an extension for subsidence and landslip. Apparently, 'subsidence' as an extension in fire policies is a recent development according to the author of the book, *Claims and Standard Fire Policies, Special Extensions and Special Perils* by RM Walmsley. This extension, according to the author, is intended to provide cover to the insured for a wide range of damage caused by, inter alia, 'settlement, collapse of the site, etc'. Since considerable time was expended by both counsel in the cross-examination of the respective witnesses on matters relating to this clause pursuant to which the insured was indemnified under the plaintiff's policy, I propose to set out in detail the relevant clause. This clause reads:

> Settlement and Landslip
>
> In consideration of the payment by the Insured to the Company of an additional premium, it is hereby agreed and declared that the insurance under this Policy shall extend to cover loss or damage to the property insured caused by subsidence and/to heave of the site on which the buildings stand or land belonging thereto, or landslip excluding loss or damage occasioned by happening through or in consequence of coastal or river erosion, demolition, structural alteration or structural repair or *defective design or inadequate* construction of foundation. (Emphasis added.)

Much reliance was placed by counsel of the defendant on the italic size word. Counsel contended that the insurance claimed ought to have been rejected as it was the result of defective design. I propose to deal with this submission later in this judgment.

[18] The damage in this case to the property are the cracks that appeared on the walls of several units of Nadia Parkhomes which was discovered on 11 January 2006. The payment of the claim made by the insured for this loss was primarily based on the final report of the loss adjusters. For this reason, I propose to examine their final report and the conclusions therein for the purposes of this judgment. Since the conclusions in para 8 of JPK's report were

A the subject matter of much cross-examination by both counsel, I propose to set out in detail this paragraph. Paragraph 8 reads as follows:

> 8.1 In view of the above JPK are therefore of the opinion that the reported cracking to the housing units was due to continuing consolidation differential settlement of footings consequent of continuing consolidation of the pre-existing variable dumped fill that was placed at various times during past quarrying operation with little or no compaction initially over virgin/undisturbed residual granitic soils. This continuing and differential consolidation had come about following placing of the compacted fill of highly non-uniform thickness (surcharging) over the pre-existing variable dumped fill also of varying thickness.
>
> 8.2 PK are also of the opinion that a substantial portion of the settlement was probably also triggered and accelerated by internal soils erosion and/or collapse settlement in the loose pre-existing soils.
>
> 8.3 The DC treatment adopted was inappropriate to treat the thick poor pre-existing ground; more so with DC through substantial compacted upper layer. As a consequence, the poor pre-existing ground below the foundations remained unimproved and prone to internal erosion and collapse settlement.
>
> 8.4 These shortcomings are obviously design related issues. Both PCG and TYL had erred in the process as elaborated earlier.

[19] The plaintiff's case essentially is that policy liability attaches under its policy irrespective of whether the cracks to the building were caused by subsidence or settlement. Counsel for the plaintiff submitted that, in fact, settlement is part of subsidence and that the English authorities accept that, in law, subsidence would involve some measure of settlement. Counsel referred the court to the case *David Allen & Sons Billposting Ltd v Drysdale* [1939] 4 All ER 113 and to the literature in RM Walmsley's book, *Claims and Standard Fire Policies, Special Extensions and Special Perils*. The author of this book states that 'subsidence' is related to a wide range of wordings with varying references to 'settlements'.

[20] Counsel for the defendant takes the position that there is a distinction in insurance law between subsidence and settlement and liability only attached, according to him, if the cracks were caused due to 'subsidence'. Counsel submitted that the reference to the word 'settlement' on more than one occasion in paras 8.1–8.4 clearly demonstrated, according to him, that according to the plaintiff's own expert, the damage, in this case, was caused by 'settlement' and not 'subsidence'. Towards this end, counsel for the defendant cross-examined the loss adjusters extensively on the conclusions set out in paras 8.1–8.4. Part of the cross-examination of the loss adjusters ie PW4, took the following form:

> Q: Look at page 78, Bundle B, conclusion by JPK, can you confirm in paragraph 8.1 to 8.3, only 'settlement' is stated in the report as the cause of failure?

A: The word used is 'settlement' but it is also in relation to 'subsidence'.

Q: Refer to page 16, definition by DR. GH Edward, do you agree with the definition?

A: This is the definition by the author, there could be other definitions. Must look at it in relation to the case.

Q: I put it to you that JPK's report did not mention 'subsidence' as a cause of failure thus the claim is not payable by the Plaintiff?

A: I disagree.

Q: Do you agree that failure to distinguish between 'subsidence' and 'settlement' is a fundamental error?

A: I disagree.

[21] Strangely, counsel for the defendant did not question the author of the report ie PW3, to the same extent as regards his conclusions in paras 8.1–8.4. In any event, in counsel's limited cross-examination of PW3 on his conclusions, PW3 confirmed that the cracks were the result of 'subsidence'.

Q: Refer to page 8 of your Report, please explain paragraph 8.1.

A: The cracks were due to continuing time dependent differential settlement of footings consequent of continuing consolidation of the pre-existing dumped fill.

Q: Are the cracks therefore the result of subsidence?

A: Yes.

[22] In my judgment, counsel for the defendant expended unnecessary time and energy in seeking to establish a distinction between the words 'subsidence' and 'settlement' for purposes of policy liability under the 'subsidence and landslip' clause. With respect, I agree with counsel for the plaintiff that 'settlement' may be a part of 'subsidence' and *David Allen*'s case is authority for the proposition that 'subsidence' would involve some measure of 'settlement' (see *David Allen & Sons Billposting Ltd v Drysdale* [1939] 4 All ER 113). In other words, I do not for one moment dispute that there is a difference between 'subsidence' and 'settlement' but, in my judgment, both 'subsidence' and 'settlement' may be covered under the plaintiff's policy depending on the causes for the cracks to the property.

[23] In my judgment, the true test to determine whether the loss, suffered by the insured on the facts of this case is covered by the 'subsidence and landslip clause' is best expounded in several passages in the book by Dr GH Edwards, *Subsidence, Landslip and Ground Heave*. These passages are highlighted by counsel for the defendant in his submission.

Subsidence

The downward movement of a site on which buildings stand, from causes unconnected with loading from a building. Examples are underground mining, clay shrinkage (especially due to the action of the tree roots) and erosion due to water passing through the sub-soil, but *excluding the compaction made-up ground or infill*.

Settlement

The Downward movement of the site due to the application of superimposed loading from a building; it is the wholly natural effect of superimposing a load on a site and is predictable.

SUBSIDENCE /SETTLEMENT

[24] 'Damage arising from subsidence of the site is frequently not distinguished from damage caused by settlement. In providing the insurance cover, insurers are seeking to cover damage caused by fortuities which may arise during the period covered by the policy. Subsidence of the site is a fortuity, whereas settlement is not and is predictable. Simple engineering tests will establish whether the load-bearing capacity of the sub-oil beneath foundations is capable of supporting the imposed load and if not, then settlement is inevitable and is not a fortuity. It is sometimes argued that the house owner is not able to distinguish between subsidence and settlement of the site but this is not a satisfactory reason for insurers being asked to pay for what is inevitable and not fortuitous damage'.

[25] Based on these passages in the authoritative text of Dr GH Edwards, policy liability, in my opinion, is not based on whether the loss was the result of 'subsidence' or 'settlement' since these two terms are often used interchangeably but whether the cracks were caused by 'causes unconnected with loading from a building'. I opine to this effect because Dr Edwards also defines 'settlement' in the context of soil movement 'due to the application of superimposed loading from a building'. In other words, the only difference between subsidence and settlement is that settlement is not fortuitous but 'the wholly natural effect of superimposing a load on a site and is predictable' whereas subsidence is fortuitous since it arises from causes unconnected with loading from a building.

[26] The plaintiff had wisely engaged the services of JPK an independent consultant to conduct the relevant engineering test to ascertain the causes for the cracks. Their test has revealed the cracks to be the result of:

(a) continuing time dependant differential 'settlement' of footings as a consequence of continuing consolidation of the pre-existing dumped fill;

(b) 'a substantial portion of the settlement' was probably triggered and accelerated by internal soil erosion and/or collapse 'settlement' in the loose pre-existing soil; and

(c) the treatment applied to treat the thick poor pre-existing ground was inappropriate.

[27] To the extent that JPK are independent consultants, naturally, the court should have regard to the conclusions in their report. It is apparent from their report and the oral evidence of PW3 that the cracks are not the natural consequence of the loading of the buildings and/or the foundation. On the contrary, the conclusions in JPK's report leave me, in no doubt, that the cracks were caused not by predictable circumstances accompanying the loading of the building and the foundations to the building but due to the state of the pre-existing soil, the poor treatment of the same and which factors were compounded by the inappropriate treatment of the thick poor pre-existing ground coupled with the application of the dynamic compaction of the upper layer. This dynamic compaction of the upper layer causing the poor pre-existing ground below the foundation to remain unimproved and to use the words of PW3 in his report 'prone to internal erosion and collapse settlement'. In para 8.1 of the JPK's report, PW3 concluded that the cause was the 'continuing consolidation of the pre-existing variable ... granitic soil'. This continuing and differential consolidation had come about following placing of the compacted fill of highly non-uniform thickness (surcharging) over the pre-existing variable dumped fill also of varying thickness. In other words, it is unrelated to compaction of made up ground or infills, which is excluded by Dr Edwards in his definition of subsidence because settlement of compacted ground or infill is to be expected as part of the settlement process. In any event, in my opinion, the cause cannot be said to be predictable when the expert is clearly of the opinion that the dynamic compaction method adopted was inappropriate.

[28] This, however, is not the end of the matter. Counsel for the defendant submitted that even if the insured's loss falls within the peril insured under the plaintiff's policy, liability is excluded since the extended coverage is only applicable to the guard house, swimming pool, etc (see cl 2 of exh 52 of bundle B). With respect, I find no merit in this submission as the reference to the swimming pool in cl 2 excludes liability for damage to the property listed under item (a) of the 'subsidence and landslip' clause and not to the building, forming the subject matter of the insured claim. Counsel for the defendant also contended that, in any event, liability under the policy is excluded because one of the conclusions in JPK's report is that the cracks were caused by design related issues. Counsel referred to para 8.4 of the JPK's report wherein one of

the conclusions is that: 'these shortcomings are obviously design related issues.' Counsel invited the court to read this conclusion in the context of cl (c) of 'the subsidence and landslip clause' which absolved the plaintiff of liability for loss or damage occasioned by 'defective design or inadequate construction or foundation'.

[29] With respect, I find no merit in this submission. It is evident from an examination of the JPK's report that PW3 used the word 'design' in para 8.4 to refer to the construction drawings with schematic prepared by Messr PCGeo Management Sdn Bhd (PCG) in connection with their dynamic compaction design as reproduced in figure 5 (exhs 74 & 83, bundle B). The author of the report who appeared as PW3 further clarified this to be the case in the course of cross-examination when he explained that he used this word in the context of earth works and dynamic compaction only. PW3 also explained that foundation in engineering involved matters such as footing and grounds supporting the building. An examination of paras 5–6 of the JPK's report (exhs 74–77, bundle B) demonstrates why proper design drawings are necessary before dynamic compaction is undertaken and the consequences of poor implementation of dynamic compaction of pre-existing soil.

[30] Another defence raised by the defendant is that this court ought to dismiss the plaintiff's claim because under the CAR policy, loss ought to be notified within 30 days from the date of loss/discovery. Counsel for the defendant contended that the loss on the facts of this case was discovered on 11 January 2006 but only notified on 20 February 2006. The plaintiff's answer to this issue is quite simply that the loss notification clause is only relevant when the claim is pursued by the insured against the defendant. The position, in this case, is very different because this is a case of a co-insurer seeking contribution. I agree entirely with the pronouncements in the case of *Legal & General Assurance Society Ltd v Drake Insurance Co Ltd* [1991] 2 Lloyd's Rep 36 that no commercial purpose is served by the insured giving notice to the defendant since he does not intend to claim against the defendant. The plaintiff's claim for contribution arises only upon the plaintiff having discharged its liability to its own insured whereupon it is entitled to call upon the defendant to bear its share of the loss and pay their proportion of the amount already paid under the plaintiff's policy (see *Law of Insurance* by Poh Chu Chai, (3rd Ed), Longmans Publication at p 791).

[31] Since the amount paid by the plaintiff to the insured of RM1,011,838.31 was not challenged, I order the defendant to pay the plaintiff

the sum of RM522,233.54 as its contribution for the amount paid by the plaintiff to the insured. I order the defendant to pay costs of RM35,000 in lieu of taxation.

Plaintiff's claim allowed with costs.

Reported by Kohila Nesan